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VIA EMAIL ONLY

Subject:

PETITION OF CALIFORNIA COASTKEEPER ALLIANCE, SANTA BARBARA CHANNELKEEPER, MONTEREY COASTKEEPER, SAN JERARDO COOPERATIVE, INC., CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, & INSTITUTE FOR FISHERIES RESOURCES; FOR PETITION OF GROWER-SHIPPER ASSOCIATION OF CENTRAL CALIFORNIA, GROWER-SHIPPER ASSOCIATION OF SANTA BARBARA AND SAN LUIS OBISPO COUNTIES, WESTERN GROWER ASSOCIATION, WESTERN PLANT HEALTH ASSOCIATION, MONTEREY COUNTY FARM BUREAU, CALIFORNIA FARM BUREAU FEDERATION & CALIFORNIA STRAWBERRY COMMISSION, FOR REVIEW OF GENERAL WASTE DISCHARGE REQUIREMENTS FOR DISCHARGES FROM IRRIGATED LANDS, ORDER NO. R3-2021-0040, DATED APRIL 15, 2021, ISSUED BY CENTRAL COAST REGIONAL WATER QUALITY CONTROL BOARD

SWRCB/OCC FILES A-2751(a-b)

RESPONSE TO GROWER-SHIPPER PETITION A-2751(a)

Dear Mr. Gillman:

Petitioners in the matter A-2751(b), California Coastkeeper Alliance, Santa Barbara Channelkeeper, Monterey Coastkeeper, San Jerardo Cooperative, California Sportfishing Alliance, Pacific Coast Federation of Fishermen's Associations, and the Institute for Fisheries Resources submit the attached response to Petition A-2751(a). If you have any questions regarding this petition, please feel free to contact us directly.

For the reasons including, but not limited to those we explain herein, the arguments in SWRCB/OCC Petition 2751(a)¹ ("Grower-Shipper Petition" or "Petition") are not supported by law, policy, or the evidence in the record for the Central Coast Waste Discharge Permit R3-

¹ May 17, 2021.

2021-0040² (“Order” or “R3-2021-0040”). Therefore, we urge that the State Board decline to modify or remand Order R3-2021-0040 based on arguments presented in the Grower-Shipper Petition for Review.

I. Overview of Legal Authority and Requirements For Regulating Pollution From Irrigated Lands.

Agricultural discharges are regulated under the Porter-Cologne Act. To implement their basin plans that establish beneficial uses and set water quality standards for the region, regional boards prescribe waste discharge requirements to regulate dischargers.³

Orders must be consistent with the State Board’s Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program⁴ (“Nonpoint Source Policy”) which was developed to satisfy federal law and is incorporated into each basin plan. The policy recognizes that management practices can successfully control the generation of nonpoint source discharges, but that management practices alone are not standards. Nonpoint source pollution control must (1) explicitly address nonpoint source pollution in a manner that achieves and maintains water quality objectives and beneficial uses; (2) include a description of management practices and program elements expected to be implemented to ensure attainment of the programs states purposes; (3) include a time schedule and quantifiable milestones designed to measure progress toward achieving specified requirements; (4) include sufficient feedback mechanisms to ensure that the program is achieving its stated purpose, and ascertain whether additional or different actions are required; and (5) state the potential consequences for failure to achieve the program’s objectives.⁵

The Order must also be consistent with California’s Human Right to Water Law,⁶ which holds up each person’s right to have safe, clean, affordable, and accessible water. The Water Boards’ responsibility extends to consideration of present and future generations, and avoiding the transfer of costs to communities affected by drinking water contamination.⁷

² April 15, 2021. AR0001 et seq.

³ Cal. Water Code §§ 13260(a)(1), 13263.

⁴ (2004). AR32818.

⁵ See, California Coastkeeper Alliance, et al., comments, June 22, 2020 (describing Nonpoint Source Policy requirements). AR8954.

⁶ Cal. Water Code § 106.3.

⁷ Resolution R3-2017-0004 Adopting the Human Right to Water as a Core Value and Directing Its Implementations in Central Coast Water Board Programs and Activities. AR33441.

Active enforcement is required by the Water Code⁸ and mandated by the Nonpoint Source Policy⁹ and the State Board Water Quality Enforcement Policy (“Enforcement Policy”).¹⁰ A significant purpose of the Nonpoint Source Policy is to enable enforcement, as reflected in its title: “Policy for Implementation and **Enforcement** of the Nonpoint Source Pollution Program.” Emphasis added. In fact, the Policy is designed to provide “a bridge between the Nonpoint Source Program Plan and the [Enforcement Policy].”¹¹ The Enforcement Policy emphasizes the necessity of enforcement in a regulatory program:

Without a strong and fair enforcement program to back up the cooperative approach, the entire regulatory framework would be in jeopardy. Enforcement is a critical ingredient in creating the deterrence needed to encourage the regulated community to anticipate, identify, and correct violations.¹²

The Enforcement Policy also promotes a “progressive enforcement” approach, which is “an escalating series of actions beginning with notification of violations and compliance assistance, followed by enforcement orders compelling compliance, culminating in a complaint for civil liabilities.”¹³

Regional boards must develop conservative waste discharge requirements, meaning that permits should err on the side of assuring that water quality objectives are achieved and achieved on a time schedule that is “not . . . longer than that which is reasonably necessary.”¹⁴ The Water Boards must take a conservative approach to fulfill a primary agency purpose: achieving and preserving water quality in California.¹⁵ The Water Code provides that “[a]ll discharges of waste into waters of the state are privileges, not rights,” and that discharge requirements “need not authorize the utilization of the full waste assimilation capacities of the receiving waters.”¹⁶ As the State Board explains:

Conservatism in the direction of high quality should guide the establishment of objectives both in water quality control plans and in waste discharge requirements. A margin of safety must be maintained to assure protection of all beneficial uses.¹⁷

⁸ Cal. Water Code § 13369 (“A nonpoint source management program shall include . . . the adoption and enforcement of waste discharge requirements that will require the implementation of best management practices.”).

⁹ Nonpoint Source Policy, p. 14 (“[A]ny enforcement limitations that might be encountered should be well understood by the RWQCB prior to approving or endorsing an NPS control implementation plan.”). AR32833.

¹⁰ (2017). AR33505 (The Order cites the State Board’s Water Quality Enforcement Policy as primary guidance. AR0009-10).

¹¹ Nonpoint Source Policy, p. 2. AR32821.

¹² Enforcement Policy, p. 1. AR33460.

¹³ Enforcement Policy, p. 3. AR33462.

¹⁴ Nonpoint Source Policy, p. 13. AR32832.

¹⁵ See, Water Code §§ 13000; 13002.

¹⁶ Water Code § 13263.

¹⁷ State Board Fact Sheet: Nine Regional Water Quality Control Boards in California. AR8954.

For water quality objectives to be achieved and maintained is the *minimum* requirement.¹⁸

II. The Order Must Contain Enforceable Interim Goals Tied to Water Quality Improvements, Which Were Included in the Order to Incentivize Participation in Third Party Programs and Make Third Party Education and Outreach Effective.¹⁹

Law and policy require the inclusion of enforceable interim numeric goals and objectives in Order R3-2021-0040, and as a necessary component that underpin all the Order's elements, removing them will undermine the Order, including the viability of third-party programs. Grower-Shipper Petitioners argue that the inclusion of enforceable consequences attached to goals for groundwater protection will undermine the efficacy of the Third-Party Alternative Compliance Pathway for Groundwater Protection.²⁰ But the record demonstrates the opposite, that defining clear expectations and consequences in advance is critical to making progress toward water quality objectives, and will most effectively leverage the resources of both the Regional Board and any third party program. This conclusion, as expressed in Order R3-2021-0040,²¹ is supported by the record, while the approach that Grower-Shipper Petitioners suggest as a preferred alternative would violate the law and fail to meet the Nonpoint Source Policy's standard for ensuring a high likelihood the program will attain water quality requirements.²²

Grower Shipper Petitioners' argument that deference is owed to their preferred vision for a third-party cooperative alternative compliance pathway, derived from their understanding of parts of the Eastern San Joaquin permit²³ ("ESJ Order"), is inconsistent with the Nonpoint Source Policy. Likewise, this assertion contradicts the ESJ Order itself.

Grower-Shipper Petitioners assertion that the State Board, in the ESJ Order, prescribed a limited use for third party programs, is incorrect. Characterizing the direction provided in the ESJ Order the Petition states "the primary usefulness of a Third-Party Alternative is the third-party and the role it plays in reaching out to and educating growers by providing information on various agricultural management practices that may help to protect groundwater beneficial uses."²⁴ However, the State Board did not prescribe a narrow and limited role for third-party programs in the ESJ Order, but merely explained that *one* value of such programs relates to outreach and education. In fact, the ESJ Order offers ongoing encouragement for regional boards to explore augmenting their resources with third-party programs:

¹⁸ See, Nonpoint Source Policy, p. 11-12 (Key Element 1 says that an NPS control implementation plans "must, at a minimum, address NPS pollution in a manner that achieves and maintains water quality objectives and beneficial uses."). AR32830-31.

¹⁹ Responding to Grower-Shipper Petition, § II., p. 22.

²⁰ Grower-Shipper Petition, § II., p. 22.

²¹ See, e.g., Order R3-2021-0040, Attachment A Findings, pp. 1-2, ¶¶ 5, 6. AR0085.

²² Nonpoint Source Policy, p. 12. AR32831.; See also, Monterey Coastkeeper v. State Water Res. Control Bd., ("Coastkeeper"), 28 Cal. App. 5th 342, 370 (Ct. App. 2018).

²³ State Board Order WQ 2018-0002. AR33505 et seq.

²⁴ Grower-Shipper Petition, p. 22.

We continue to support third-party approaches to regulating agricultural discharges, as permitted by the Nonpoint Source Policy . . . From a resource perspective, third parties allow a regional water board to leverage limited regulatory staff by acting as intermediaries between the regional water board staff and the growers, freeing regional water board resources to focus on problem areas or actors. Third parties also may have the expertise to provide technical assistance and training to growers at a scale that cannot be matched by regional water board staff resources, and, in many cases, third parties already have relationships in place with the dischargers . . . Because third parties build on relationships already in place with growers, third parties can engender a high level of trust and more effectively reach out to growers to increase understanding of the permit provisions and to facilitate management practice development and deployment, especially in cases where improved management practices are required of particular growers.²⁵

Accordingly, regional boards should explore how to best leverage third party programs to address the unique circumstances and staffing needs within their respective regions.

The Regional Board appropriately hosted numerous wide-ranging public discussions to evaluate the potential roles and utility of third-party programs, and how to structure the order to maximize the efficacy of those programs. The provisions ultimately incorporated into the Order thus benefitted from diverse stakeholder input, including sustained and involved participation from the primary third-party on the Central Coast.²⁶ The substantial attention and breadth of discussions devoted to optimizing the use of “third-party programs” was appropriate considering the innumerable potential variations and limited examples available for use as guidance. The Nonpoint Source Policy emphasizes this point:

Less is understood about the alternative alliances and management structures - the third-party programs - that most efficiently and effectively will result in the watershed or industry-wide actions needed to control NPS pollution statewide.²⁷

Thus, the Regional Board properly considered unique regional conditions and stakeholder concerns in designing the proposed Third-Party Alternative Compliance Pathway for Groundwater Protection. Many stakeholders, including agricultural stakeholders and third-party program providers under the previous order, actively contributed in the process of optimizing third-party roles under the Order.

Grower-Shipper Petitioners’ argument that differences between Order R3-2021-0040 and the ESJ Order will necessarily undermine the efficacy of the Central Coast Order has no basis in fact. Order R3-2021-0040 is not identical to the ESJ Order, but the State Board never intended subsequent orders statewide to be identical, but rather should integrate the precedential components of the ESJ Order. Moreover, Order R3-2021-0040 is consistent with the ESJ Order’s precedential components and was designed to ensure that any third party administering the

²⁵ ESJ Order, p. 20. AR33524.

²⁶ See, e.g., Amended Administrative Index, p. 47-51 (listing ex parte communications, showing Sarah Lopez, Executive Director of Preservation Inc., engaged regularly in ex parte communications with board members from the beginning until the end of the proceeding).

²⁷ Nonpoint Source Policy, p. 16. AR32835.

Cooperative Alternative Pathway for Groundwater Protection is successful in protecting beneficial uses of groundwater. Importantly, the structure includes consequences that are designed to incentivize growers to not only join and stay in the third-party, but also to make meaningful progress toward achieving water quality objectives.

Grower-Shipper Petitioners express dissatisfaction with the process of developing the order, which led to adoption of R3-2010-0040.²⁸ They contend that the Regional Board improperly “maintained key elements of significant concern” including fertilizer application limits, nitrogen discharge limits, surface water limits, and ranch level monitoring.²⁹ Throughout the years-long process, Grower-Shipper Petitioners consistently argued for an order that would eliminate any accountability for individual growers who fail to protect or improve water quality. However, law and policy, when applied to the evidence available to the Central Coast Regional Board, dictated that individual accountability was a necessary component for the Order.³⁰

Consistent with the Nonpoint Source Policy, the question of whether and how to use numeric limits was interrogated in each potentially “enforceable” detail and at every stage of the process.³¹ During the discussions that led to the Board’s ultimate decision to further develop its original conceptual framework for numeric limits, the Central Coast Regional Board Executive Officer explained the value and imperative of including some numeric limit for nitrogen applications:

This is kind of a nuclear option . . . We don’t want to regard it lightly . . . overapply it . . . But there is a need at some point when there is clearly a waste, clearly a discharge we can say that is clearly causing a waste, clearly causing a discharge . . . and knowing what we know about groundwater, the condition of groundwater beneath agricultural areas, it feels unconscionable to not have that top-side limit, it feels unethical, knowing that information and still not saying that is generating waste, we know it is generating waste and yet we’re still not having a limit.³²

That quote by the Executive Officer essentially provides a layperson’s interpretation of Order R3-2021-0040’s legal findings, which explain that:

[P]revious agricultural orders relied on a management practice implementation approach without clear and enforceable requirements . . . necessary to drive the development and implementation of effective management practices or evaluate their effectiveness with respect to reducing pollutant loading, achieving water quality objectives and protecting beneficial uses. This Order takes a more meaningful and performance-based approach

²⁸ Grower-Shipper Petition, p. 17-19.

²⁹ Grower-Shipper Petition, p. 19-20.

³⁰ See, e.g., California Coastkeeper, et al., legal comment June 22, 2020. AR8952 et seq.

³¹ “While not all programs need be directly enforceable, any enforcement limitations that might be encountered should be well understood by the RWQCB prior to approving or endorsing an NPS control implementation program.” Nonpoint Source Policy at 14. AR32833.

³² John Robertson’s quote from 5/15/19 board meeting (timestamp 3:44:00). AR6158.

focused on accountability and verification of resolving the known water quality problems.³³

In addition to expressing the need for individual accountability, the Executive Officer's quote above also expresses the Regional Board's intention to use *extreme* restraint in the use of enforceable numeric limits. The two years between when the board approved moving forward with the conceptual model, to when Order R3-2021-0040 was adopted, could fairly be described as a long process of refining and re-refining the potentially enforceable components. As described below, the enforceable components that the Grower-Shipper Petitioners object to have been debated at length, clothed in various layers of administrative red-tape in direct response to their concerns, delaying and deferring improvements to water quality required by the Order to the point of running contrary to the public interest.³⁴

During the years of refining the Order's details, Grower-Shipper Petitioners repeatedly argued that these provisions were unnecessary; at hearings, in comment letters, and ostensibly during ex parte meetings.³⁵ However, state policies and law require individual accountability to address the severely degraded waters on the Central Coast, and building an order without limits would have been an abuse of discretion.

A. Targets Are Not Limits, and Both Are Necessary to Assure the Viability and Efficacy of the Third-Party Compliance Pathway for Groundwater Protection.³⁶

Grower-Shipper Petitioners argue that nitrogen discharge targets are limits in disguise, but do not provide a legitimate basis for excluding the discharge limits. They assert, without providing relevant evidence, that including enforceable discharge limits so the Regional Board has the option to hold growers accountable individually, will somehow undermine the viability of the program. Their argument relies entirely on the theory that including limits violates State Board policy as articulated in the ESJ Order, which is incorrect.³⁷ The Grower-Shipper Petitioners' willingness to equate the concepts of targets and limits is problematic because the record demonstrates that the targets lose much of their usefulness if the limits are removed.

Put simply, the difference between the concepts is that limits are enforceable, and targets are not. The Regional Board determined, based data collected in the region, that an order without

³³ Order R3-2021-0040, Attachment A Findings, pp. 1-2, ¶¶ 5, 6. AR0004-05. See also, Coastkeeper, 28 Cal. App. 5th 342, 369 (finding the previous approach of relying on management practices without enforceable standards to violate the Nonpoint Source Policy).

³⁴ As we have detailed in our Petition SWRCB/OCC File A-2751(b), the final order fails to adequately protect and restore beneficial uses.

³⁵ Rather than provide evidence and recommendations about what numeric values might be appropriate, Grower-Shipper Petitioners obstinately argued that no numeric quantifiable milestone is appropriate, and refused to provide input requested by the Regional Board. See, e.g., California Coastkeeper Alliance, et al, comment letter, February 25, 2021, Attachment C, Declaration of Steve Shimek. AR1536-38.; Central Coast Regional Board meeting, March 21, 2019, timestamp 2:33:00 (board member Hunter explaining that staff did not receive feedback and input requested in "farm alternative" and that this undermines the Regional Board's long-term effort to set up the process to be highly transparent). AR6114.

³⁶ Responding to Grower-Shipper Petition, § II.A., p. 24.

³⁷ See, e.g., Order, Attachment A Findings, pp. 77-89. AR0160-173.; See also, section IV. *infra*.

enforceable, performance-based accountability for resolving known water quality problems, would fail to protect and restore beneficial uses of water.³⁸ The presence of both targets and limits, together with the relationship between the two, which includes triggers and intermediate steps towards meeting enforceable limits, constitutes the Order's primary strategy for protecting groundwater. These elements are designed to be predictable, and to provide growers with time and multiple options for achieving compliance.³⁹

The interplay between targets and limits is also designed to incentivize good faith participation in, and the viability of the Third-Party Alternative Compliance Pathway for Groundwater Protection.⁴⁰

B. Numeric Eligibility Criteria Are Critical Elements Ensuring the Viability and Efficacy of the Third-Party Alternative and Are Not Rigid.⁴¹

Grower-Shipper Petitioners assert the Regional Board improperly rejected their proposal that ineligibility for third party programs should require a finding by the Regional Board that the participating discharger is not working with the third-party in good faith.⁴² But the inclusion of numeric targets provides the structure for determining which growers are operating in good faith *and* protecting water quality; both elements are required under the law. Establishing these objective criteria in advance has advantages of being efficient and predictable for all stakeholders.

The Regional Board has a duty to ensure that good faith participation in the Third-Party Program also results in improved water quality. Said differently, the law requires more than good faith efforts; the law requires water quality objectives be achieved.⁴³ The consensus of the board and stakeholders in 2019 was that a third-party program providing education and outreach would benefit from clear expectations for what, exactly, good faith participation must achieve, and when good faith participation is not enough. Order R3-2021-0040 recognizes that "good standing" is not necessarily equivalent with protecting water quality. Merely participating in good faith cannot be a shield to actual compliance.⁴⁴

The critical fact that Grower-Shipper Petitioners refuse to accept is that failing to require individual grower accountability by establishing numeric standards would undermine the Regional Board's ability to ensure progress is being made. An order without enforceable,

³⁸ Order R3-2021-0040, Attachment A Findings, pp. 1-2, ¶¶ 5, 6. AR 0083-84.

³⁹ See, e.g., Order p. 10, ¶ 44. ("The Central Coast Water Board acknowledges that it will take time to develop meaningful and effective third-party programs that facilitate compliance with this Order. The Order considers this by allowing an initial grace period for the phasing in of various requirements."). AR0013.

⁴⁰ See, e.g., Revised Draft Agricultural Order 4.0, Master Response to Comments, p. 18. AR16544.

⁴¹ Responding to Grower-Shipper Petition, § II.B., p. 25.

⁴² Grower-Shipper Petition, p. 26.

⁴³ Coastkeeper, 28 Cal. App. 5th 342, 369 (explaining that management practice implementation may never be a substitute for meeting water quality requirements).

⁴⁴ Id.

performance-based accountability for resolving known water quality problems, would not make progress toward protecting and restoring beneficial uses of water.⁴⁵

Because the system of eligibility is based on predictable numeric targets established in advance, it will incentivize efforts to meaningfully address water quality impairments. Key to incentivizing efforts to meet targets is having meaningful consequences for failing to meet them, which must include the potential for enforcement. Indeed, the Regional Board heard testimony from a wide range of stakeholders, including Grower-Shipper Petitioners, that enforcement was critical to the success of the program and was a useful incentive. Incentives can be positive or negative, and the two sides of the coin were regularly referred to during Regional Board meetings as the “carrot and stick.” Indeed, agricultural stakeholders stated, for example, “enforcement is a huge incentive” and explained that “lack of enforcement can undermine a program very quickly.”⁴⁶ These comments acknowledge what the State Board Enforcement Policy states, that “enforcement is a critical ingredient in creating the **deterrence needed to encourage** the regulated community to anticipate, identify, and correct violations.”⁴⁷

The lion’s share of the discussions starting in early 2020 addressed the question of how the targets should be designed to fairly incentivize and ensure “good faith” efforts by individual growers. Numeric discharge targets and limits must be included, but contrary to Grower-Shipper Petitioners’ assertions, the specific targets and limits included in the Order are designed to ensure the Third-Party Alternative is viable and effective.

The Order Must Incentivize Participation and Incentivize Improving Water Quality.

The Grower-Shipper Petition focuses narrowly on incentivizing participation in the Third-Party Alternative for Groundwater Protection. But the ultimate goal is not to incentivize participation, the goal is to protect and restore beneficial uses of water. Getting enrollment is only the first step; an order that merely seeks to incentivize enrollment does not satisfy the Nonpoint Source Policy.⁴⁸ Thus, to be viable, the Third-Party Alternative must effectively incentivize enrollment and also incentivize performance in resolving known water quality problems.⁴⁹

Incentives to *join* the Third Party are different from incentives to *perform* in the third party. For example, the Regional Board explains “[w]ithout this backstop (20% over 3 year running average) there will be no incentive for individual members to contribute to the collective compliance with groundwater protection area targets.”⁵⁰ Provisions for ranch-level monitoring demonstrate this point. Compliance with numeric targets is required to maintain membership

⁴⁵ See, e.g., Order R3-2021-0040, Attachment A Findings, pp. 1-2, ¶¶ 5, 6. AR0084-85.; p. 144, ¶20 (“To make progress towards reducing nitrogen waste discharges arising from the over-application of synthetic fertilizer nitrogen and to reduce the risk of nitrogen discharge, enforceable fertilizer application limits are established.”). AR0227.

⁴⁶ Central Coast Regional Board meeting, March 21, 2019, starting at timestamp 4:28:00. AR6114.

⁴⁷ State Board Water Quality Enforcement Policy, p. 1 (emphasis added). AR33460.

⁴⁸ Coastkeeper, 28 Cal. App. 5th 342, 369.

⁴⁹ Order R3-2021-0040, Attachment A Findings, pp. 1-2, ¶¶ 5, 6. AR0084-85.

⁵⁰ Revised Draft Agricultural Order 4.0, Master Response to Comments, p. 18. AR16544.

with the Third-Party Alternative for Groundwater, which in turn prevents the Regional Board from requiring ranch level monitoring. The imposition of ranch level monitoring as a consequence of failing to meet targets at once provides a necessary alternative measure to help protect water quality and adds an extra incentive for growers to remain in good standing with the Third-Party Alternative program.⁵¹ This serves as an example of how incorporating predictable targets and compliance dates, as well as clear consequences for noncompliance, serve to both increase the value of third-party programs for growers, and incentivize participation. Thus, Grower-Shipper Petitioners' arguments that the Order doesn't do enough to incentivize participation are contradictory to their position that the elements of the Order that are necessary to incentivize participation should be taken out.

Requiring the Third-Party to Determine Eligibility Would Violate the Law and Undermine the Third-Party Program by Requiring Them to Make Enforcement Related Decisions.

Grower-Shipper's proposal would improperly burden the Third-Party with the duties of the Regional Board. The Order must describe necessary actions to be taken by a third party.⁵² The Regional Board is required to explain "how significant non-compliance can be addressed in Third-Party Programs. This explanation should include information as to the criteria for measuring program success, what constitutes failure, and the actions that may be taken in repose to failure. Individual dischargers need to be informed as to what individual discharger actions or inactions will lead to individual enforcement."⁵³ If the Regional Board does not provide clearly defined eligibility requirements for Third-Party Alternative membership in advance, then it falls to the third party program to determine when that line has been crossed, and thus they effectively stand in the shoes of enforcer. This approach violates the law, and further, all parties agree that the role of a third-party program must not include decision-making related to enforcement.

Grower-Shipper Petitioners provided testimony squarely addressing the issue of third-party program decision-making on enforcement. At the March 21, 2019 Central Coast Regional Board meeting, various presenters on the agricultural panel explained the difficulties associated with a third-party program provider being put in the role of enforcer, how it would undermine the role, and why enforcement decisions should fall to the Regional Board.⁵⁴

Stakeholders, including the Grower-Shipper Petitioners agree, and that the Third-Party Alternative Program provider should be focused on outreach and education, not engaging in policy decisions about what level of performance should be required, which, if not fulfilled might cause growers to lose membership eligibility and potentially lead to enforcement. Yet the necessary result of the Grower-Shipper Petitioners proposal would create exactly this scenario. The Grower-Shipper Petition is contradictory, in that it asks the State Board to limit Third-Party Alternative provider work to education and outreach in one breath, and in the next breath seeks

⁵¹ We note that this is an example of where the Grower-Shipper Petitioners' demands are contradictory, both demanding that the viability of the Third-Party Alternative be bolstered, while attacking the very provisions designed to incentivize participation and efficacy of the program.

⁵² Cal. Water Code §13242.

⁵³ Nonpoint Source Policy, p. 15. AR32834.

⁵⁴ Central Coast Regional Board meeting, March 21, 2019, starting at timestamp 4:25:00. AR6114.

to require the third party to take on the role of regulator; taking on the role of making enforcement policy decisions would undermine the third party's work in education and outreach.

The Order instead makes an efficient use of the limited resources of the Regional Board and any Third-Party Alternative program provider, by requiring those third parties present updates, and propose modifications as necessary to the structure and substance of the Order components defining targets and limits or otherwise. This occurs in regular reports to the Regional Board and during mandatory reviews.

The Third-Party Alternative will comply with the law and be most effective if the Regional Board describes the system for consequences and accountability, including the potential for enforcement. The potential for enforcement is a necessary component for incentivizing good faith efforts to protect and restore water quality in the Order.

The Numeric Eligibility Requirements for the Third-Party Alternative are Not Rigid Enough.

Eligibility for the Third-Party Alternative for Groundwater has many moving parts which undermine the Orders numeric requirements and, ultimately, the legal sufficiency of the Order. Grower-Shipper Petitioners express concerns that there is no respite for growers who are unable to meet groundwater protection targets, but are actively and in good faith taking steps to meet the targets. As we discuss in our petition,⁵⁵ in fact, the targets are anything but rigid, and numerous provisions of the order protect grower membership individually and collectively.

First, of all, the Order requires review of targets below 400 lbs.⁵⁶ The Grower-Shipper Petitioners' primary focal point relates to economic impact on lettuce growers. However, the Order prevents even the 300 limit/target from going into effect without reconsideration by the board, which will consider data collected over intervening years, reports by the Third-Party Alternative program provider(s), and public input, and ostensibly a range of suggested modifications. If and when the targets below 200 lbs. will come into play is anything but certain.

Second, the Order's targets for Third Party Alternative program members are significantly more permissive than limits that apply to non-members. The Order specifies a 300 lbs. target, plus 20 percent wiggle room, leading to a target of 360 pounds per acre.⁵⁷ Given that the 300 lbs. target is actually a 360 lbs. target, and must also be reviewed before it goes into effect, the Order lacks a timeline for reaching anything beyond a 360 lbs. discharge level, with members benefiting from much more flexibility.

⁵⁵ Cite our petition, relevant section.

⁵⁶ See Order p. 52; Table C.2-1 (ACP): "The final 2028 nitrogen discharge targets will be re-evaluated based on discharger reported nitrogen applied and removed data, new science, management practice implementation and assessment, and third-party GWP collective numeric interim and final targets before becoming effective." Order p. 54.; See also, Table C.3-1: "The initial 2027 nitrogen discharge limits will be re-evaluated based on discharger reported nitrogen applied and removed data, new science, and management practice implementation and assessment before becoming effective."

⁵⁷ Order R3-2021-0040, p. 35, ¶¶ 19, 20. AR0114.

Third, the Order does not prevent growers from regaining membership. The fact that growers may regain membership in the Third-Party Alternative mitigates the “rigidity” of eligibility requirements. We note also that contrary to the Grower-Shipper’s assertion, Order R3-2021-0040 does not preclude third party education and outreach when AR reporting demonstrates a grower is in violation of targets/limits for Groundwater Protection.⁵⁸ If growers were to lose eligibility to participate in the Third-Party Alternative program, the Regional Board would not be the only option for providing technical support and education. The Order allows third parties to fill any number of support roles to help growers meet requirements.⁵⁹ For example, in the unlikely case that a critical mass of growers did lose eligibility, a third party could be created or engaged to support growers in regaining eligibility or complying with numeric limits otherwise

In addition, cooperative and individual compliance options available under the Order have unlimited potential to provide other alternatives to demonstrate growers are not degrading the quality of groundwater.⁶⁰

Lastly, the third party is required to report back to the Regional Board regularly, and may propose modifications as necessary to the structure and substance of the Order components defining targets and limits or otherwise. The review required before the 300 lbs. target can go into place will be informed by regular review of data submitted to the Regional Board and reports by the Third-Party program provider.

We note that the fact of a grower violating an enforceable numeric limit will also invoke a flexible response from the Regional Board. The Order subscribes to “progressive enforcement,” a strategy that is included in the State Board Enforcement Policy. Under progressive enforcement, the Regional Board will escalate a series of actions, starting with notice, then moving to compliance assistance, orders for compliance, and eventually a compliant for civil liabilities.⁶¹

⁵⁸ See Staff Report ESJ Precedential Requirement Summary, p. 4. (“Staff recommends that the role of a third-party implementation program in the Central Coast Region, with respect to AR data compilation, assessment, and reporting, be different than that in the Central Valley. Staff recommends that the third-party program not be an intermediary that collects field level AR data and reports that data to the regional board in aggregated form. This does not preclude, however, the possibility of an effective third-party implementation program in the Central Coast Region providing education and outreach to growers whose AR reporting demonstrates values in excess of the numeric targets and limits established in the time schedule”). AR5879.

⁵⁹ See Order, p. 9, ¶ 43. AR0012.

⁶⁰ FEIR Volume 3, Master Response to Comments, p. 2-6 (“Dischargers, groups of dischargers, or commodity groups who can quantify the amount of nitrogen discharged from their ranch or for specific crops or via specific management practices by directly monitoring it at the points of discharge can propose an alternative monitoring methodology to comply with the nitrogen discharge targets and limits, in lieu of using the nitrogen applied minus removed compliance formulas. Example situations where this may apply includes greenhouse, nursery, container production or intensive crop production where irrigation and drain water is captured and allows for direct monitoring of discharges.”). AR1535.

⁶¹ Enforcement Policy, p. 3. AR33462.

Ultimately, the Order has many elements that render the so-called “rigid” numeric eligibility requirements ambiguous at best. The requirements are not “rigid,” and there are many built in controls to ensure the Order strikes a balance of improving water quality at a pace that agricultural operations can assimilate to. But if they were rigid and rigidly implemented, it would still take over 100 years to achieve water quality in many agricultural subbasins.⁶² The Order’s targets/limits could, in theory reach a discharge level of 50 pounds of nitrogen per acre per year in 2050 if subsequent reviews do not extend timelines. But even under that unlikely scenario which the Order does not commit to, nitrate exceedances in groundwater will persist long beyond 2050 as the excess nitrate from the decades leading up to 2050 percolates into groundwater. It is unclear when, if ever, groundwater will achieve nitrate standards under the Order, and thus violates the Nonpoint Source Policy.⁶³

III. California Law Authorizes the Central Coast Water Board To Restrict the Use of Fertilizers and To Require Monitoring For 1,2,3-TCP.

California law invests the Regional Board with substantial authority to restrict waste discharges that could impair the quality of state waters. This includes discharges of nitrates from fertilizers and other dangerous chemicals that are applied to agricultural lands or persist in the soil from previous application. The Order’s requirements concerning nitrate limits and TCP monitoring are consistent with state law. Grower Shipper Petitioners’ arguments to the contrary are unsupported by legal authority and inconsistent with the purpose of the Porter Cologne Act to protect the quality of state waters.⁶⁴

B. The Regional Board has the Legal Authority to Adopt Nitrogen Application Limits.⁶⁵

The Porter Cologne Act invests Regional Water Boards with the authority to prescribe waste discharge requirements to regulate any discharges that “could affect the quality of the waters of the state.”⁶⁶ This necessarily includes the authority to regulate “any activity or factor which may affect” water quality.⁶⁷ Because the application of pesticides and fertilizers is an activity that may affect water quality, the Regional Board has a duty to regulate this activity to prevent polluting chemical and nitrates from impairing state waters. Moreover, because the amount or ratio in which nitrates are applied to irrigated lands has been found to be a factor

⁶² See Order, Attachment A Findings, p. 161 ¶ 73. AR0240.

⁶³ See, e.g., Nonpoint Source Policy p. 13, (water quality requirements are achieved and achieved on a time schedule that is “not . . . longer than that which is reasonably necessary.”). AR32832.

⁶⁴ Water Code § 13000.

⁶⁵ Responding to Grower-Shipper Petition, p. 28, § III.A.; See also, Monterey Coastkeeper, et al, May 1, 2019, Comments Regarding Ag Order 4.0 and the Regional Board’s Legal Authority (discussing additional authority for nitrogen application limits). Attached (we were unable to find this letter in the administrative record)

⁶⁶ Water Code §§ 13260, 13263.

⁶⁷ S. Cal. Edison Co. v. State Water Resources Control Bd., 116 Cal. App. 3d 751, 758 (1981); see also Water Code §§ 13000, 13050.

affecting the discharge of nitrate pollution into basin waters,⁶⁸ this amount or ratio may also be regulated.⁶⁹

In regulating proposed waste discharges, the Regional Board may also “specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted.”⁷⁰ The Ag Order’s proposed limits on the application of nitrogen fertilizers are precisely such a condition, designed to reduce pollution at the source, and thus well within the Board’s legal authority. Conditions designed to prevent pollution are also consistent with the Legislature’s declaration that “pollution prevention should be the first step in a hierarchy for reducing pollution and managing wastes.”⁷¹ Limiting the quantity of nitrates that are applied to irrigated lands is a reasonable condition to prevent an excess of nitrates from leaching into groundwater, where it has already contaminated many drinking water wells,⁷² and could also help prevent further pollution of surface waters via runoff.⁷³

There is no question that groundwater pollution from nitrates is a pressing problem in the Central Coast region. As detailed in the Regional Board findings, data collected from regional wells indicates that nitrate pollution has continued to increase despite the Water Boards’ efforts to address this issue by encouraging improved management practices.⁷⁴ In the meantime, research conducted to examine this ongoing problem found that reducing the excess levels of nitrate fertilizer applied to cultivated lands is a key factor in reducing groundwater contamination.⁷⁵

As noted above, Grower-Shipper Petitioners’ assertion that the Regional Board lacks authority to regulate nitrate applications lacks any basis in legal authority. The fact that nitrate fertilizers may have a beneficial impact on crop production has no bearing on the fact that nitrate released into waters of the state constitutes a waste discharge. While Petitioners attempt to support their theory by citing the lower court decision in Sweeney, which held that fill dirt was not “waste” because it was a valuable building material, that ruling was reversed by the Court of Appeals and lacks legal authority.⁷⁶ As the appellate decision affirmed: “the fact that a particular material may have commercial value does not preclude it from being waste under the Porter-Cologne Act. . . Its characterization [as waste] did not turn on the purported value of the discharged material but rather the harm it caused to the environment.”⁷⁷

⁶⁸ See e.g., Attachment A, Findings, at p. 141, 145, ¶¶ 11-12, 23. AR0220-24.

⁶⁹ See, e.g., Statewide Cannabis Order, p. 59, term 112 (Setting a nitrogen application limit of 319 pounds/acre/year). Referenced in Monterey Coastkeeper, et al., May 1, 2019, Comments Regarding Ag Order 4.0 and the Regional Board’s Legal Authority (discussing additional authority for nitrogen application limits). Attached.

⁷⁰ Water Code § 13243.

⁷¹ Water Code § 13263.3.

⁷² See Attachment A, Findings, at p. 139-142, ¶¶ 8-16 (discussing Regional Board findings concerning existing nitrate pollution in the Central Coast region, including current trends and drivers.) AR0218-220.

⁷³ Id. at p. 173-75, ¶¶ 21-31. AR0252-55.

⁷⁴ Id. at p. 140-41, ¶ 10, and Tables Related to Nitrate in Groundwater, at p. 223-234. AR0219.

⁷⁵ Id. at p. 142, ¶ 16. AR0221.

⁷⁶ Sweeney v. California Reg’l Water Quality Control Bd., 61 Cal. App. 5th 1093, 1118–19 (2021), as modified on denial of reh’g (Mar. 18, 2021), review denied (June 9, 2021).

⁷⁷ Id.

The analysis in Sweeney is also consistent with the Water Code. Overapplication of any chemical that results in a discharge that impairs water quality constitutes a discharge of waste that is subject to regulation. “Waste” includes any substance generated from a producing operation,⁷⁸ and applying fertilizer to crops is a step in agricultural production. Thus, inputs that are beneficial or integral to production can be regulated when they are applied.

Importantly, “[n]o discharge of waste into the waters of the state . . . shall create a vested right to continue the discharge. All discharges of waste into waters of the state are privileges, not rights.”⁷⁹ While the Regional Board acknowledges that irrigated agriculture is an important industry within the Central Coast region,⁸⁰ and refrains from prohibiting nitrate discharges altogether, the failure to regulate excessive ongoing nitrate applications would be a derogation of the Board’s duty to protect water quality.⁸¹ Irrigated agriculture is not above the law and has no vested right to engage in activities that impair water quality or undermine the right to safe drinking water.⁸²

Therefore, because the Regional Board is authorized to regulate waste dischargers, including any substance from a producing operation that stands to impair water quality, and the application of nitrates is a key factor contributing to nitrate pollution in the Central Coast region, the Order’s proposed nitrate application limits are legal and should be retained.

B. The Regional Water Board Has Ample Authority to Require Landowners and Operators of Irrigated Agricultural Lands to Monitor and Report on the Presence of 1,2,3-TCP Found in On-Farm Domestic Wells.⁸³

The Regional Board has authority to require landowners and operators of irrigated agricultural lands (“growers”) to monitor and report on 1,2,3-TCP (“TCP”) found in on-farm domestic wells because these growers are dischargers of agricultural wastewater that may contain TCP.

Growers Are Dischargers Because They Own or Operate Irrigated Agricultural Lands from Which There Are Continuing Discharges of Waste.

As discussed above, growers are dischargers because they are owners or operators of irrigated agricultural lands that discharge waste into California waters. California law grants regional water boards broad authority to investigate waste discharges: “the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region . . . [to] furnish . . . technical or

⁷⁸ Water Code § 13050(d).

⁷⁹ Water Code § 13263(g).

⁸⁰ See Order Attachment A, Findings, at p. 149, ¶ 28. AR0228.

⁸¹ Water Code § 13000.

⁸² Water Code § 106.3.

⁸³ Responding to Grower-Shipper Petition, p. 31, § III.B.

monitoring program reports which the regional board requires.”⁸⁴ The monitoring requirements in the Order are consistent with this authorization.

The term “discharge” includes agricultural activities that cause waste present in soil to enter California waters.⁸⁵ California courts have consistently affirmed the Water Boards’ longstanding interpretation of the term discharge. For example, a recent appellate case noted that the Water Boards have used the term discharge “for the past 40 years to refer to the entire time during which the discharged waste remains in the soil or groundwater and continues to impact or to threaten the groundwater.”⁸⁶

Notably, the Order’s approach to monitoring for TCP aligns with the Water Code’s objective of protecting the quality of the state’s waters from degradation.⁸⁷ Alleged factual differences asserted by Grower-Shipper Petitioners to distinguish In the Matter of Zoecon Corporation, State Board Order WQ 86-2 (“Zoecon”) are not determinative, as the authority for monitoring comes from the Water Code, and not from this previous State Board Order. In addition, Petitioners’ interpretation of legal authorities is flawed, as both Zoecon and the other authority they cite, Tesoro Refining & Marketing Co. LLC v. Los Angeles Regional Water Quality Control Board⁸⁸ (“Tesoro”), ultimately support the Regional Boards requirements for monitoring TCP.

The Tesoro court held that the term discharge properly encompassed the entire time waste remains in the soil and groundwater and potentially threatens beneficial uses of water.⁸⁹ In that case, the Los Angeles Regional Board had issued a clean-up and abatement order to Tesoro for discharges of gasoline that appeared to originate from a Tesoro pipeline.⁹⁰ Tesoro challenged the order, arguing that the Regional Board’s definition of discharge was wrong because Tesoro could not be held responsible for discharges that occurred before 1970 and thus predated the Porter Cologne Act.⁹¹ The court rejected this argument, finding that the term discharge encompasses “not simply the initial episode of contamination” but properly includes the “ongoing movement of contaminants through the soil and into the groundwater.”⁹² The court held that Regional Board’s broad definition was consistent with the plain language of the statute, as well as other existing law, and would “best attain the legislative purpose of the Porter-Cologne Act” to protect water quality from all waste discharges.⁹³

⁸⁴ Cal. Water Code § 13267 (b)(1).

⁸⁵ Tesoro Refining & Marketing Co. LLC v. Los Angeles Regional Water Quality Control Board (“Tesoro”) (2019) 42 Cal.App.5th 453, 472.

⁸⁶ Id. (citing In re Atchison, Topeka and Santa Fe Railway Company (Order No. WQ 74-13, Aug. 15, 1974) 1974 WL 353947 (Cal.St.Wat.Res.Bd.) at p. *3; In re Zoecon Corp. (Order No. WQ 86-2, Feb. 20, 1986) 1986 WL 25502 (Cal.St.Wat.Res.Bd.) at p. *2-3; and In re Spitzer (Order No. WQ 89-8, May 16, 1989) 1989 WL 1680124 (Cal.St.Wat.Res.Bd.) at p. *6-7).

⁸⁷ Water Code § 13000.

⁸⁸ Tesoro, 42 Cal.App.5th 453.

⁸⁹ Id. at 472.

⁹⁰ Id. at 460, 462.

⁹¹ Id. at 464-65.

⁹² Id. at 472, 473.

⁹³ Id. at 473-75.

In *Zoecon*, the State Board similarly held that landowners are dischargers with respect to any wastes emanating from their properties, regardless of the original source and whether the landowner's actions caused the waste to be there.⁹⁴ For example, in *Zoecon*, the State Board found that *Zoecon* was properly subject to an abatement order to address discharges stemming from the actions of a previous landowner who manufactured pesticides and herbicides on the site.⁹⁵ As a result of the manufacturing operation, contaminants had been deposited in a shallow sludge pond and later spread by surface runoff to the surrounding property.⁹⁶ The State Board held that *Zoecon*'s status as landowner made it "well suited to carrying out the needed onsite cleanup" because it had "exclusive control over access to the property."⁹⁷ Thus, *Zoecon* was a discharger because it owned the land from which a waste discharge emanated even though it did not initially place the contaminants on the land.

Similarly, Order R3-2021-0040 defines dischargers "as both the landowner and the operator of irrigated agricultural land on or from which there are discharges of waste from irrigated agricultural activities that could affect the quality of any surface water or groundwater."⁹⁸ Like the definition of discharge that California courts and the State Board have upheld for decades, the key determinant is the ongoing presence of waste that could impair the quality of basin waters rather than who caused the waste to be there. The Order is thus consistent with established law.

Agricultural Petitioners attempt to distinguish *Tesorero* and *Zoecon* because they involved point-source discharges of pollutants rather than nonpoint discharges of agricultural waste.⁹⁹ This argument is unpersuasive. In fact, the *Zoecon* decision addressed this purported distinction by noting that the Regional Board had discretion to extend the order to neighboring property owners if fact-finding indicated those properties were also contaminated.¹⁰⁰ In other words, owners of properties adjacent to the point source could equally be deemed dischargers if their lands were found to also discharge waste, even though there was no point source on those lands. Thus, the critical issue in determining who is a discharger is the ongoing discharge of waste, not whether a discharger is a point-source or nonpoint-source polluter.

Here, like the petitioners in *Tesorero* and *Zoecon*, permittees are dischargers because they are the current owners or operators of irrigated agricultural lands that discharge waste into basin waters.¹⁰¹ There is no dispute that the discharge of pollutants from irrigated lands has an ongoing, adverse impact on water quality throughout the Central Coast region.¹⁰² Therefore, the Regional Board has authority to require growers to monitor and report on specific pollutants, including TCP, in its effort to protect beneficial uses and achieve water quality objectives.¹⁰³

⁹⁴ *Zoecon* at *5.

⁹⁵ *Id.* at *1.

⁹⁶ *Id.*

⁹⁷ *Id.* at *5.

⁹⁸ Order, p. 14. AR0017.

⁹⁹ Grower-Shippers Petition for Review 33.

¹⁰⁰ *Zoecon* at *5.

¹⁰¹ Order at p. 14. AR0017.

¹⁰² Order, p. 1-2. AR0004-05.

¹⁰³ Cal. Water Code § 13267 (b)(1).

Because the Record Contains Evidence of TCP Contamination in Central Coast Groundwater Associated with Agricultural Discharges, the Regional Board May Require Growers to Monitor and Report on TCP.

The Regional Board has authority to require growers to furnish technical and monitoring reports on TCP in on-farm domestic wells because this determination is supported by relevant evidence.

The Water Code requires the Regional Boards to support monitoring and reporting requirements with “a written explanation with regard to the need for the reports” and by identifying “evidence that supports requiring that person to provide the reports.”¹⁰⁴ Evidence in this context means “any relevant evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.”¹⁰⁵

The Regional Board explains its requirement for monitoring and reporting on TCP and supports this with relevant evidence in the record.¹⁰⁶ TCP is a known carcinogen that has been detected in Central Coast water systems, monitoring wells, and private domestic wells. There is also evidence of “a clear correlation between the location of drinking water sources that exceeded the 1,2,3-TCP [maximum contaminant level] and agricultural/industrial activities.”¹⁰⁷ Existing data from the Regional Board’s Domestic Well Sampling Program has already found TCP in 22 out of 325 private domestic wells that were tested, including 21 wells that exceeded the maximum contaminant level for safe drinking water.¹⁰⁸ Because TCP exceedances render well water undrinkable, residents whose wells are found to exceed the safe level must find alternative sources of drinking water, such as bottled water.¹⁰⁹ A failure to protect these residents would violate the human right to water law. Therefore, because the record contains evidence that TCP is a known groundwater contaminant associated with irrigated agriculture, and which threatens the beneficial use of water for drinking in the Central Coast Region, the Regional Board has adequately supported the Order’s requirement to monitor and report on TCP.¹¹⁰

IV. Including a Nitrogen Discharge Limit Equation Does Not Contradict State Board Precedent.¹¹¹

The Grower-Shipper Petition objects to the nitrogen discharge limit, relying primarily on elements of the Eastern San Joaquin Order. However, Petitioners’ arguments are unpersuasive

¹⁰⁴ Cal. Water Code § 13267 (b).

¹⁰⁵ Cal. Water Code § 13267 (e).

¹⁰⁶ See Attachment A, p. 167-68, ¶¶ 99-104. AR0246.

¹⁰⁷ *Id.*, p. 167, ¶ 102. (n.25 cites the Division of Drinking Water (DDW) website on 1,2,3-TCP as the source of additional reports and data). AR0246; See 1,2,3,-TRICHLOROPROPANE (1,2,3 – TCP), STATE WATER RESOURCES CONTROL BOARD (Sept 29, 2020) https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/123TCP.html.)

¹⁰⁸ *Id.*, p.167-68, ¶ 103. AR0246.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*, p.168, ¶ 14. AR0247.

¹¹¹ Responding to Grower-Shipper Petition, p. 34, § IV.

because they hinge on elements of the East San Joaquin Order which are neither precedential nor can reasonably be interpreted to prevent the Central Coast from taking meaningful steps to regulate pollution based on A-R, and they misrepresent the details of Order R3-2021-0040. The precedential elements of the ESJ Order shaped Order R3-2021-0040. During the process Grower-Shipper Petitioners regularly presented on the various elements of the ESJ Order, and then as now, argue that the Central Coast ag order should mirror the ESJ Order. But the Regional Board was not at liberty to ignore the unique facts of the Central Coast by adopting the Grower-Shipper Petitioners' reading of the ESJ Order.

A. Overview of the Precedential Elements of The ESJ Order.

As opposed to more traditional rulemaking, the issuance of WDRs is a context-specific adjudicative process. “[I]nterpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases.”¹¹² Thus, it is up to the Regional Board to determine, based on the unique circumstances on the Central Coast, what regulatory approaches will be effective.

The State Board explicitly recognizes that its precedential orders do not have the same binding effect as statutes or administrative regulations.¹¹³ Precedential decisions “provide guidance” for later orders.¹¹⁴ Accordingly, the State Board explains that “[a] Regional Board may conclude that based on differences between the facts before the Regional Board and the facts that were the basis for the State Board precedent, a State Board precedent either does not apply or should be modified as applied in the proceeding before the Regional Board.”¹¹⁵

The ESJ Order provides boundaries for its own precedential character. It explicitly calls out those elements which should be considered precedential. This is explained in section I. of the ESJ Order:

In the sections that follow, we indicate which of our conclusions have precedential effect and will guide irrigated lands regulatory programs statewide.¹¹⁶

Taking the language of the ESJ Order at face value, which is consistent with case law and other guidance from the State Board, those conclusions that are labeled as precedential should guide irrigated lands programs statewide, but should not be considered binding, and the lion's share of the ESJ Order which is not specifically labeled as precedential was not intended to be precedential or to guide irrigated lands regulatory programs statewide.

¹¹² Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal. 4th 557, 571 (1996).

¹¹³ See, California Coastkeeper, et al., legal comment June 22, 2020, p. 11 (citing guidance on the State Board website at https://www.waterboards.ca.gov/board_decisions/adopted_orders/). AR8962.

¹¹⁴ Id.

¹¹⁵ Id.

¹¹⁶ ESJ Order, p. 9. AR33513.

B. The Central Coast’s Nitrogen Discharge Limits Using A-R Are Consistent With the ESJ Order.

Grower-Shipper Petitioners assert that the ESJ Order, including its non-precedential elements, should have a binding effect on the Central Coast’s Order. This is inconsistent with the ESJ Order and principles of administrative law.

First and foremost, the Petitioners suggests that the State Board’s non-precedential directions to the Central Valley should be strictly applied as law on the Central Coast. In particular, the Petition repeatedly referecnes the following non-precedential reasoning under the subheading “Direction to the Central Valley Water Board Regarding Use of Submitted Data.”

It is premature at this point to project the manner in which the multi-year A/R ratio target values might serve as regulatory tools. That determination will be informed by the data collected and the research conducted in the next several years. If we move forward with a new regulatory approach in the future, we expect to do so only after convening an expert panel that can help evaluate and consider the appropriate use of the acceptable ranges for multi-year A/R ratio target values in irrigated lands regulatory programs statewide.¹¹⁷

The Grower-Shipper Petitioners assert this passage is precedential and should be interpreted to mean that the State Board “declined to use A/R target values as a regulatory tool or end point at this point in time.”¹¹⁸ This ESJ Order does not indicate that this section is precedential, and in fact, is directed explicitly and exclusively to the Central Valley Regional Board, as indicated by the heading under which it is placed. Even if this language were directed to other regions and precedential, it would be unreasonable to interpret it in the way Petitioners suggest. The statement does not prohibit development of new regulatory tools, but merely opines as to what the State Board “expects” might happen. Further, the language cannot reasonably be read to suggest that A/R target values are *not* regulatory tools, as Grower-Shipper Petitioners assert. The ESJ Order uses AR data as a regulatory tool, requiring, for example, that AR data be gathered and used in education and informing management practices (i.e., a tool used in the regulation of irrigated agriculture). The ESJ Order does not suggest, as precedent or otherwise, that A-R should not be used as a regulatory tool, or that A/R is being prescribed as the exclusive regulatory tool to be used in irrigated lands programs. Thus, the Order’s use of A-R is consistent with the ESJ Order.

The Central Coast Regional Board considered and heeded, to the extent possible, the faulty interpretation of the Grower-Shipper Petitions nonetheless. In particular, Order R3-2021-0040 takes care to build in numerous safeguards to prevent discharge targets from becoming limits. For example, the limits will not go into effect for at least another six years, a full ten years after the 2018 ESJ Order was issued and the State Board direction to the Central Valley was provided.¹¹⁹ A second example is that R3-2021-0040’s discharge limits will not go into effect

¹¹⁷ ESJ Order, p. 14. AR33518.

¹¹⁸ Grower-Shipper Petition p. 34.

¹¹⁹ See, Order Attachment A Findings, p. 89, ¶¶ 270 f-g (explain the intent to allow for the State Board to convene an expert panel). AR0172.

until at least five more years of data have been collected. That data must be analyzed, the Central Coast board members must then provide a public review, and then sign off on the targets becoming limits before they go into effect.

In the ESJ Order the State Board concluded that, based on the evidence in the record specific to circumstances in the Eastern San Joaquin, that it was premature to establish a limit. Grower-Shipper Petitioners' argument here would effectively require the Central Coast Regional Board to ignore the unique circumstances on the central coast, including AR data that predates 2018, evidence of severe and ongoing degradation, and a notable failure of past orders to take a "meaningful approach including individual accountability."¹²⁰ Said differently, the Petitioners' approach would effectively insert the ESJ record from 2018 in place of the vast record from this proceeding. Meanwhile, the Central Coast Regional Board and regional stakeholders spent thousands of hours to produce order R3-2021-0040, which has a unique administrative record of approximately 36,000 pages and additional video and audio testimony, and includes insight and guidance from agricultural interests, and third-party program providers with significant experience working as an intermediary between the Central Coast Regional Board and permittees. The "precedential conclusions" of the ESJ Order are included in the record, but constitute only a small portion of what was considered, and cannot displace binding authority. Grower-Shipper Petitioners' argument that discharge limits must be removed has no support under law or state policy.

C. The Grower-Shipper Petitioners Ignore Substantial Evidence Provided in Support of the Nitrogen Discharge Limits Including Requirement for Further Refinement of the Tool Before Limits Go Into Effect.

The Grower-Shipper Petitioners arguments fail to recognize the evidentiary support for numeric discharge limits. Ultimately, the guidance provided in the ESJ Order, State Board policies, and legal authority, in combination with the circumstances on the Central Coast, dictated the need to include numeric limits in the Order.¹²¹ As explained previously, limits can't go into place until numerous layers of ongoing data collection, research, analysis, and board review are completed.¹²²

Grower-Shipper Petitioners argue that testimony from scientists during the State Board's ESJ Proceeding, in 2018, demonstrate that the discharge limit structure in R3-2021-0040 should be removed.¹²³ But Grower-Shipper Petitioners ignore the science and testimony in the Central Coast Order's proceeding. Grower-Shipper Petitioners were free to provide scientific evidence and recommendations about what numeric values would be appropriate on the Central Coast. Grower-Shipper Petitioners argued that there is no limit that would be appropriate under any

¹²⁰ Order R3-2021-0040, Attachment A Findings, p. 2, ¶6. AR0085.

¹²¹ See, e.g., Order R3-2021-0040, Attachment A Findings, p. 144, ¶20 ("Based on TNA data from 2014 through 2019, fertilizer nitrogen application rates (AFER) have not changed significantly in response to the TNA reporting requirement alone. To make progress towards reducing nitrogen waste discharges arising from the over-application of synthetic fertilizer nitrogen and to reduce the risk of nitrogen discharge, this Order establishes fertilizer application targets and limits."). AR0223.

¹²² See supra, § II.B. (Explaining that the numeric limits are not rigid).

¹²³ Grower-Shipper Petition, p. 34.

circumstances. Not only did this cause significant delays in the adoption process as the Regional Board tried repeatedly to gather input,¹²⁴ but also precludes the Grower-Shipper Petitioners from arguing in good faith at this stage that the specific numeric limits that were included are not appropriate.

Grower-Shipper Petitioners characterize R3-2021-0040 as containing a “discharge limit based on A-R for an amount that is designed to ensure that no residual nitrogen is available for potential leaching to groundwater” and then assert that such a limit “would surely cripple the economic sustainability of Central Coast Agriculture.”¹²⁵ But the A-R limit is does not contemplate leaving *no* residual nitrogen. It contemplates achieving Water Quality Objectives for municipal supply, and on a timeline of longer than 100 years for some polluted groundwater basins. In fact, the Order does not provide certainty that the 300 pound limit on discharge will even go into place, and does not contemplate an A-R limit of zero as the Grower Shipper Petitioners suggest.¹²⁶ As explained in section IX. below, the Petitioner’s assertion that agriculture will be crippled is not supported by the record, and depends on numerous worst case assumptions combined with a mischaracterization that Order R3-2021-0040 is “rigid” as discussed previously in section II.

V. Grower-Shipper Petition’s Suggested Alternative for Impermeable Surfaces Will Not Protect Water Quality.¹²⁷

Grower-Shipper Petitioners argue that the requirements for impermeable surfaces included are too broad and expensive to be reasonable or effective. However, the alternative they provide does not adequately address the significant water quality impacts caused by use of impermeable surfaces. Their alternative depends on a monitoring regime which has sufficient special density and sophistication to identify individual farm sources of pollution. The Order does not contain such a monitoring regime.

We agree with Grower-Shipper Petitioners that surface water quality monitoring designed to identify the source of pollution should be included in the Order. Indeed, we proposed such a program during the proceedings on the Order.¹²⁸ However, that monitoring program was rejected, was not supported by Grower-Shipper Petitioners, and is not part of the Order. The Order’s provisions for protecting against the unique water quality impacts of impermeable are inadequate, but not for the reasons suggested by Grower-Shipper Petitioners. Surface water quality provisions of the Order lack numeric quantifiable milestones that the Regional Board can readily verify, and thus, will ensure water quality objectives are protected.

The Grower-Shipper Petitioners’ concerns about implementation of impermeable surface provisions assumes that no cooperative solutions to meet the demands of the Order will be developed. The Regional Board contemplated that it would take some effort, for example, for

¹²⁴ See supra, fn. 35.

¹²⁵ Grower-Shipper Petition p. 36.

¹²⁶ Grower-Shipper Petition p. 36.

¹²⁷ Responding to Grower-Shipper Petition, § V.A., p. 37.

¹²⁸ See, The Otter Project, et al., January 22, 2019 comments (describing “up the pipe” monitoring approach). AR5723.; Public Interest Proposal, March 20, 2019, Regional Board meeting. AR6056.

small farms with limited expertise to begin measuring volume of surface water flows. R3-2021-0040 provides for reasonable, industry led solutions to be developed:

The Central Coast Water Board encourages Dischargers to participate in third- party groups or programs (e.g., certification program, watershed group, water quality coalition, monitoring coalition, or other third-party effort) to facilitate and document compliance with this Order. . . Commodity group certification programs may also be effective in facilitating compliance with this Order.¹²⁹

The Regional Board contemplated the issues raised by the Grower-Shipper Petitioners. The Petitioners do not provide evidence that cooperative programs and solutions will not be developed for the issues they raise in their petition.

VI. Surface Water Receiving Limits for Certain Pesticides Are Proper.¹³⁰

The Basin Plan establishes narrative water quality objectives for both pesticides and toxicity, and the Order is required to implement those objectives: “The [waste discharge] requirements shall implement any relevant water quality control plans that have been adopted, and shall take into consideration . . . the water quality objectives reasonably required for that purpose.”¹³¹ The Basin Plan’s Water Quality Objectives for toxicity and pesticides provide authority for the Order to establish numeric pesticide objectives.

Toxicity: All waters shall be maintained free of toxic substances in concentrations which are toxic to, or which produce detrimental physiological responses in, human, plant, animal, or aquatic life. Compliance with this objective will be determined by use of indicator organisms, analyses of species diversity, population density, growth anomalies, toxicity bioassays of appropriate duration, **or other appropriate methods as specified by the Regional Board . . .**

Pesticides: No individual pesticide or combination of pesticides **shall reach concentrations that adversely affect beneficial uses.** There shall be no increase in pesticide concentrations found in bottom sediments or aquatic life.¹³²

Pesticides in concentrations beyond the numeric thresholds established to meet the requirements of these narrative objectives. The Order’s findings provide sufficient basis for establishing the numeric surface water criteria based on the requirements of the toxicity and pesticide Water Quality Objectives in the Basin Plan.¹³³

¹²⁹ Order R3-2021-0040, pp. 9-10, ¶ 43. AR0011.

¹³⁰ Responding to Grower-Shipper Petition, § V.B., p. 40.

¹³¹ Water Code § 13263.

¹³² See Basin Plan (2019), pp. 31-32 (emphasis added). AR34091.

¹³³ Order, Attachment A Findings, p. 189, ¶ 110 (“Waterbodies that do not have established toxicity TMDLs for particular pesticides are assigned numeric limits based on the narrative water quality objectives and values from the sources shown in Table A.C.3-2, which are **protective of aquatic life** and address acute risk (short-term effects such as survival and growth) and chronic risk (longer term effects such as reproduction) for the listed constituent.” Emphasis added). AR0268.

We note also that Regional Board was required to take into consideration the factors listed in section 13241 when these objectives were adopted into the Basin Plan.¹³⁴ The water quality objectives already exist in the basin plan, and thus, section 13241 factors need not be explicitly addressed in the Order because the factors have already been analyzed for those objectives. Specific findings on the section 13241 factors are not required.¹³⁵

VII. Ranch-level Groundwater and Surface Water Quality Monitoring Provisions Are Reasonable and Incentivize Good Faith Participation in Third-Party Programs.¹³⁶

Grower-Shipper Petitioners characterization of the effort required, in comparison to the usefulness of the information gathered, for ranch-level monitoring for both groundwater and surface water ignores the narrowly defined and extreme circumstances of water quality degradation that must be present before the Executive Officer has discretion to require this monitoring. Ranch level groundwater discharge monitoring can only be required of growers not in good standing with the Third-Party Alternative program, and will then only be one of many options the Regional Board has in its toolbelt to ensure growers can mitigate pollution their operations cause. For both surface and groundwater programs, ranch level monitoring will enable the Regional Board to fulfil its duty to ensure reasonable progress is made toward achieving water quality objectives.

Order R3-2021-0040 provisions for ranch level discharge monitoring create individual accountability for growers and thus create incentives to work toward achieving water quality objectives. With respect to ranch level groundwater monitoring, the Order incentivizes participation in the Third-Party Alternative program by exempting its members from ranch level groundwater monitoring.¹³⁷ Striking these provisions will not only undermine the Regional Board's ability to gather valuable data, but it will also undermine accountability and the viability of the Third-Party Alternative for Groundwater Protection. The Petitioners' desire to strike ranch level monitoring is an example of inconsistency in their positions, both criticizing R3-2021-0020 for not providing for a viable Third-Party Program, while also seeking the removal of the very provisions that incentivize participation and thus, make the program viable.

Under Order R3-2021-0040, if the Executive Officer requires ranch level discharge monitoring, the "reasonableness" requirements of section 13267 will be met. The Executive Officer is only permitted to require ranch level monitoring in the first place if numerous conditions are met, which when met, by definition, provide a reasonable basis for requiring ranch level monitoring. For groundwater, a grower must have first lost good standing with Third-Party Program (or chosen not to participate), and groundwater quality data, or significant and repeated

¹³⁴ Water Code § 13241 (Requiring factors be considered by a regional board in establishing water quality objectives).

¹³⁵ See City of Duarte v. State Water Res. Control Bd., 60 Cal. App. 5th 258, 273-76, (2021), as modified on denial of reh'g (Feb. 19, 2021), review denied (Apr. 28, 2021)

¹³⁶ Responding to Grower-Shipper Petition, § V.C., p. 41.

¹³⁷ Order, Attachment B Monitoring and Reporting, p. 19. AR0403.

exceedance of discharge targets or limits must show the collection of data is warranted.¹³⁸ For surface water, monitoring can occur only given exceedances of applicable surface water quality limits, including concentration and loading for all applicable parameters in their discharge.¹³⁹

The Order also dictates that the benefits of ranch level monitoring data will provide be significant for an individual operation, which also contributes to the reasonableness requirement of section 13267. For groundwater, ranch level monitoring will gather data to help: assess and quantify the discharger's contribution to the exceedance of the nitrogen discharge targets or limits and the discharge of nitrogen below the root zone; assess the timeframe over which discharge below the root zone occurs; assess management practice implementation to identify management practices that can be implemented on the ranch to control or eliminate discharges below the root zone; evaluate effects of the discharge on groundwater quality and beneficial uses with respect to applicable water quality objectives; and, demonstrate compliance with applicable nitrogen discharge targets or limits and water quality objectives over time.¹⁴⁰

Similarly, for monitoring ranch level surface water discharges, benefits will include gathering data to help: assess and quantify the discharger's contribution to the exceedance of applicable surface water quality limits, including concentration and loading for all applicable parameters in their discharge; evaluate effects of the discharge on receiving water quality and beneficial uses; and demonstrate compliance with applicable surface water limits and water quality objectives over time.¹⁴¹ The specific, and extreme circumstances where ranch-level monitoring may be required, along with the value that will be created through data collection are sufficient to sustain the provisions' reasonableness.

We note also that the Petition mischaracterizes section 783 of title 23 of the Code of Regulations,¹⁴² which does not prohibit monitoring of groundwater. That provision relates specifically to authority related to reports of waste discharge under section 13260 of the Water Code, while the authority for ranch level monitoring comes from a separate and distinct authority under section 13267.¹⁴³ Thus, section 783 does not apply to the ranch level monitoring provisions of the Order.

VIII. Interim Quantifiable Milestones Must Measure and Allow the Regional Board to Ensure Progress Toward Water Quality Objectives.¹⁴⁴

Grower-Shipper Petitioners assert that the Order's inclusion of the word or concept of "numeric," adding a qualifier to the plain language of the Nonpoint Source Policy ("*numeric*

¹³⁸ *Id.*

¹³⁹ *Id.*, p. 29. AR0413.

¹⁴⁰ *Id.*, p.19. AR0403.

¹⁴¹ *Id.*, p. 29. AR0413.

¹⁴² Grower-Shipper Petition at 41.

¹⁴³ Order, Attachment B Monitoring and Reporting, p. 1 ("This Monitoring and Reporting Program (MRP) is issued pursuant to California Water Code section 13267, which authorizes the Central Coast Regional Water Quality Control Board (Central Coast Water Board) to require preparation and submittal of technical and monitoring reports."). AR0385.

¹⁴⁴ Responding to Grower-Shipper Petition, § V.D., p. 42.

interim quantifiable milestones”) is inconsistent with the Nonpoint Source Policy. Again, Petitioners ignore that significant ongoing water quality degradation, and the failures of past orders that the Regional Board has a duty to remedy. “Previous agricultural orders relied on a management practice implementation approach without clear and enforceable requirements . . . Although the previous orders increased awareness of the pollutant loading and associated water quality problems caused by agricultural activities, they have not resulted in improved water quality or beneficial use protection.¹⁴⁵

The Coastkeeper decision determined that overly vague provisions calling for “improved management practices” in a previous Central Coast irrigated lands permit were not adequate under the Nonpoint Source policy.¹⁴⁶ Thus, adding specificity through numeric interim milestones to increase the efficacy of the program is consistent with the interpretation of the Nonpoint Source Policy provided in Coastkeeper. The Order must require specificity in how it will quantify improvements to water quality to sustain the findings required by the Nonpoint Source Policy that the program has a high likelihood of success of restoring and protecting Water Quality Objectives.¹⁴⁷

IX. Cumulative Long-Term Impacts and Harm to Growers Were Adequately Considered.¹⁴⁸

The Grower-Shipper Petitioners assertion that the Regional Board failed to adequately consider the Order’s cumulative long-term economic impacts to agriculture as required under section 13241¹⁴⁹ is without merit.¹⁵⁰

First, section 13263 does not require the board to *reconsider* economics in prescribing discharger requirements. Because the Order merely implements previously established water quality objectives, section 13263’s requirement to take into consideration the factors listed in section 13241 has necessarily already been met. Nevertheless, the Regional Board did undertake an analysis of the factors.

The Regional Board’s analysis of economic impacts to agriculture is adequate under section 13241. Courts have repeatedly affirmed the statute does not require “the board to make specific findings on the [13241] factors” or “an analysis of every conceivable compliance method or combinations thereof or the fiscal impacts on permittees.”¹⁵¹ The Regional Board was

¹⁴⁵ Order R3-2021-0040, Attachment A Findings, pp. 1-2, ¶ 5. AR0084-85.

¹⁴⁶ Coastkeeper, 28 Cal. App. 5th 342, 370.

¹⁴⁷ See Nonpoint Source Policy, p. 12 (“A RWQCB must be able to determine that there is a high likelihood that the program will attain water quality requirements.”). AR32831.

¹⁴⁸ Responding to Grower-Shipper Petition, § V.E., p. 43.

¹⁴⁹ Grower-Shipper Petition, p. 43; Water Code § 13241.

¹⁵⁰ See, e.g., California Coastkeeper Alliance, et al., Petition file A-2751(a), p. 24 (explaining that the impacts as a result of injury to recreational and ecological beneficial uses, and public trust resources, have not been adequately considered, and weigh in favor of shorter timelines to protect and restore Water Quality Objectives).

¹⁵¹ City of Duarte v. State Water Res. Control Bd., 60 Cal. App. 5th 258, 273-76, (2021), as modified on denial of reh'g (Feb. 19, 2021), review denied (Apr. 28, 2021).

correct to make cost of compliance the primary economic consideration.¹⁵² Other variables courts have found relevant to the 13241(d) analysis in upholding permits,¹⁵³ which were considered by the Regional Board include: health impacts and economic impacts of a failure to regulate;¹⁵⁴ variability in operations of individual permittees; and, flexibility in the permit.

As to the variability in operations of individual permittees, Grower-Shipper Petitioner's argument depends on agricultural operations' relative uniformity in current operations and uniformity in responses to the new permit conditions. The Regional Board explains this is a flawed assumption:

[I]t is not possible to predict which growers will implement which management practices in which locations, and there are numerous potential options for individual growers to meet the discharge, application, and receiving waster limits included in the Order. Additionally, the specific impacts of any increased agricultural order 4.0 compliance costs would depend on the unique characteristics of individual ranches/operations, including their crop mix, operating costs/capital, cash reserves, and other variable factors.¹⁵⁵

Petitioners assume that permittees' (and the wider public's) views on water-quality and valuation of water resources will remain static as well. But water quality objectives will not be achieved without a change in priorities and relationship to water resources,¹⁵⁶ which will be a prerequisite for some farms to change farming practices. The Order is designed to bring about change in agricultural practices and drive innovation,¹⁵⁷ and builds in time for this process to unfold.¹⁵⁸

Petitioner's argument also depends on the Order's requirements being rigid and the Order remaining static. However, it is designed to be flexible in both respects. The flexibility written

¹⁵² City of Duarte v. State Water Res. Control Bd., 60 Cal. App. 5th 258, 272.

¹⁵³ See, City of Duarte v. State Water Res. Control Bd., 60 Cal. App. 5th 258, 274-75 (describing considerations including flexibility in permit for how requirements will be met, variability of costs to different permittees, benefits of managing pollution compared to costs, health impacts, and tourism impacts).

¹⁵⁴ See, e.g., FEIR Volume 3, Master Response to Comments, p. 2-22 (“a large number of scientific research studies and research papers indicate if current nitrogen loading rates continue, the current problem will continue; in this case, future attempts to address the water quality problem will require more stringent requirements to reduce loading.”). AR1552.

¹⁵⁵ FEIR Volume 3, Master Response to Comments, p. 2-52. AR1581.

¹⁵⁶ See, e.g., FEIR Volume 3, Master Response to Comments, p. 2-22 (“Existing irrigation and nutrient management practices based on “agronomic science” are primarily focused on crop production performance metrics and do not sufficiently address water quality.”). AR1552.

¹⁵⁷ See, e.g., FEIR Volume 3, Master Response to Comments, p. 2-22 (“groundwater protection requirements are intended to promote a cultural shift in agricultural practices to include water quality-based performance metrics that are protective of water quality and beneficial uses while maintaining crop productivity to the extent practicable.”) AR1552; Order p. 9-10, ¶ 43 (“Third party programs are designed to facilitate compliance, effectiveness, economies of scale, and innovation.”). AR0013.

¹⁵⁸ Order p. 10, ¶ 44 (“The Central Coast Water Board acknowledges that it will take time to develop meaningful and effective third-party programs that facilitate compliance with this Order. The Order considers this by allowing an initial grace period for the phasing in of various requirements.”). AR0014.

into the Order's eligibility requirements for the Third-Party Alternative are not rigid, as we explain in section II above. The numeric requirements are not rigid, there are a wide range of consequences for exceeding them,¹⁵⁹ which creates more uncertainty as to how numeric interim milestones might cause harm to growers.

Moving forward, the Order is designed to be iterative and flexible. For example, mandatory review at five-year intervals will "identify successes, challenges, and emerging science and management practices" as part of "an adaptive management process to inform modifications to the Order."¹⁶⁰ Indeed, Petitioners acknowledge that there is little certainty of harm to growers, saying that for the main provisions of the Order:

[P]otential harm to growers is currently unknown because interpretation or implementation is delegated to future decisions of the Central Coast Water Board's Executive Officer. In general, Petitioners do not oppose the phasing of the orders' varied requirements but it makes it difficult to know if and when harm may occur. Further, Petitioners understand that it is common to delegate interpretation and approval of future deliverables to the Board's Executive Officer."¹⁶¹

The Petitioners' primary focal point for arguing that the Order will make agricultural production infeasible is derived from an analysis of the economic impact of numeric discharge targets and limits on lettuce producers. Petitioners claim the targets/limits of 200 lbs. and acre and 50 lbs. will have economic impacts of \$119.4 million and \$683 million a year respectively. First of all, the Regional Board reasonably concluded this analysis was exaggerated.¹⁶² Further, because the analysis relates to a narrow set of permittees, it should not weigh substantially in the 13241 analysis,¹⁶³ particularly given that most farms are meeting short-term goals for nitrogen, and many are already meeting final goals.¹⁶⁴ Lastly, there is no certainty that the 200 lbs. or 50 lbs. targets or limits will ever go into place; the Order prevents even the 300 limit/target from going into effect without reconsideration by the board.¹⁶⁵

¹⁵⁹ See, e.g., Order Attachment A Findings, p. 84, ¶264 (explaining that "Dischargers who exceed the targets or limits will be subject to additional requirements, such as the requirement to obtain additional education, INMP certification by a qualified professional, implement additional or improved management practices, lower fertilizer nitrogen application limits, and/or increased monitoring and reporting."). AR 0167.

¹⁶⁰ Order, p. 15, ¶ 32. AR0046.

¹⁶¹ Grower-Shipper Petition, p. 21.

¹⁶² FEIR Volume 3, Master Response to Comments, p. 2-52. AR1583.

¹⁶³ See, City of Duarte v. State Water Res. Control Bd., 60 Cal. App. 5th 258, 274-75 (describing considerations including variability of costs to different permittees).

¹⁶⁴ See, Order, Attachment A Findings, p. 148 ("Table A.C.1-4. Percent of Ranches Achieving Discharge Targets and Limits"). AR0227.

¹⁶⁵ See Order, p. 52; Table C.2-1 ("The final 2028 nitrogen discharge targets will be re-evaluated based on discharger reported nitrogen applied and removed data, new science, management practice implementation and assessment, and third-party GWP collective numeric interim and final targets before becoming effective."). AR0055; See also, Order p. 54. Table C.3-1 ("The initial 2027 nitrogen discharge limits will be re-evaluated based on discharger reported nitrogen applied and removed data, new science, and management practice implementation and assessment before becoming effective."). AR0057.

Petitioners also fail to acknowledge the countervailing economic impact of not regulating agricultural discharges proactively at this time. The Regional Board explains that delay will ultimately result in more drastic measures in the future:

There is strong consensus that if current nitrogen loading rates continue, the current problem will continue into the future; in this case, future attempts to address the water quality problem will require more drastic reductions.¹⁶⁶

More drastic reductions are likely to lead to more drastic economic impacts on agriculture by comparison. Thus, the imposition of the Order's requirements are likely to limit long-term economic impacts to the agricultural industry.

For reasons included above, the Petitioners' assertions that the cumulative impact of the Order will be devastating to agriculture, and thus the Regional Board is in violation of section 13241, run contrary to the evidence in the record.

X. Grower-Shipper Arguments That the FEIR Does Not Comply With CEQA Are Based On Unreasonable Economic Assumptions.¹⁶⁷

All the arguments in the Petitioners' CEQA section flow from the same argument from section IX above: that certainty exists as to the catastrophic economic harm the Order will cause growers. This argument relies on flawed characterizations of the Order and the industry. Petitioners' argument relies on false premises including that: the requirements of the Order are "rigid;" the permit will not be modified; the agricultural industry is not capable of slowly improving its practices; and, most operations can currently meet numeric targets/limits for groundwater protection. In addition to these unreasonable assumptions, their CEQA argument requires an additional assumption that there will be a resulting harm of putting a large number of farms out of business which will then result in a "significant" environmental impact.¹⁶⁸

We have explored the Petitioners assertions related to certain economic harm above, which ignore many provisions included in the Order, and related findings, which are intended to ensure the program performs as intended by striking a balance of improving water quality with a pace that agricultural operations that currently pollute heavily can assimilate to.¹⁶⁹ In summary, the requirements of the Order are not "rigid"; the permit will be reviewed regularly and modified accordingly; the of harm of regulating proactively now will be drastic as compared to delaying further; many growers are already operating in compliance with the Order's substantive requirements; the agricultural industry is capable of slowly improving practices; most farms are meeting short-term goals for nitrogen, and many are already meeting final goals; and, individual accountability and enforceable of interim numeric milestones are needed to incentivize action. Because the Grower-Shipper Petitioner's CEQA arguments rely on the same flawed assumptions, the CEQA arguments are similarly unpersuasive.

¹⁶⁶ Order, Attachment A Findings, p. 115. AR0198.

¹⁶⁷ Responding to Grower-Shipper Petition, Part 2, p. 48 et seq.

¹⁶⁸ See, Pub. Res. Code § 21082(a) (requiring substantial evidence of a significant effect).

¹⁶⁹ See, §§ II. supra; IX supra.

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